Supreme Court, U.S.
FILED
99 566 AUG - 9 1999
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES ALBERT KING,

Petitioner,

V.

JAMES ANDERSON,

Respondent.

Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

David L. Walker
Counsel of Record
Law Offices of David L. Walker
P. O. Box 719
Batesville, MS 38606
(601) 563-2514

Counsel for Petitioner

27 pp

QUESTIONS PRESENTED FOR REVIEW

The following questions are presented for review:

(1). Whether the Petitioner's Fifth, Sixth and Fourteenth Amendment to the United States Constitution rights to due process of law and a fair trial were violated by the Court of Appeals affirmance of the lower Court's denial of his petition for writ of habeas corpus.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

OPINIONS DELIVERED BY LOWER COURT.....1

CONSTITUTIONAL PROVISIONS INVOLVED IN CASE.....1

STATEMENT OF THE CASE.....2

ARGUMENTS FOR ALLOWANCE OF WRIT.....3

APPENDIX.....ia

Table of Contents.....ia

TABLE OF AUTHORITIES

Page

CASES

Bracey v. Gramley, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997) 3

Cartalino v. Washington, 122 F. 3d 8, 9 (7th Cir. 1997) 3

Estelle v. McGuire, 502 U.S. 62 (1991) 4

Vasquez v. Hillery, 474 U.S. 254, 263, 106 S. Ct. 617, 623, 88 L. Ed. 2d 598 (1986) (dicta) 4

UNITED STATES CONSTITUTION

Amendment 5 3

Amendment 6 3

Amendment 8 3

Amendment 14 3

PETITION FOR A WRIT OF CERTIORARI

COMES NOW, the Petitioner, James Albert King, by and through counsel, David L. Walker, Law Offices of David L. Walker, and hereby petitions the Court for writ of certiorari.

OPINION DELIVERED BY LOWER COURT

On May 25, 1999, the Court of Appeals for the Fifth Circuit Court of Appeals affirmed the U.S. District Court's denial of the Petitioner's Petition for Writ of Habeas Corpus.

GROUNDS FOR JURISDICTION

The Court has jurisdiction in that this is a petition for a writ of certiorari from denial of a Petition for Writ of Habeas Corpus alleging violation of the Petitioner's constitutional rights and involves an opinion issued by the Court of Appeals for the Fifth Circuit Court issued on May 25, 1999.

CONSTITUTIONAL PROVISIONS INVOLVED

The Petitioner alleges that his constitutional rights to due process of law and a fair trial as set out in the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution have been violated.

STATEMENT OF THE CASE

On December 4, 1986 Johnny Wayne King was being tried for the sale of a controlled substance. The Honorable Judge George C. Carlson, Jr. was advised by the bailiff that two of the jurors had been approached by persons who tried to influence their verdict.

Judge Carlson then conducted an investigation and determined that a mistrial must be declared. He then prepared and signed arrest warrants for the two individuals who he thought had attempted to influence the jury based on his investigation. That is, the Petitioner, James Albert King, and Petitioner's son Johnny Wayne King.

Prior to trial, the Petitioner's trial attorney filed a Motion for the Trial Judge to Recuse Himself. The motion stated that the trial judge's personal involvment in the investigation and the issuance of warrants made the trial judge an interested party. However, the judge did not recuse himself from the trial. Petitioner was convicted of bribery, conspiracy and two counts of attempting to obstruct and impede the administration of justice on July 24, 1987. He was sentenced to fourteen (14) years in prison.

Petitioner's petition for habeas corpus was recommended for denial in the report and recommendation of the U.S. Magistrate Judge, S. Allen Alexander, on October 24, 1997, and this recommendation was adopted as the final judgment of the United States District Judge for the Northern District of Mississippi on January 29, 1998.

ARGUMENT FOR ALLOWANCE OF WRIT

Petitioner argues that he was deprived of his fundamental right to a fair trial and due process of law guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States of America when the trial judge failed to recuse himself from the trial after Petitioner's trial counsel filed a motion to recuse. Petitioner argues that because the trial judge was personally aware of the facts of the case for which he was tried and over which he presided, the Petitioner was denied his right to a fair trial.

According to the U.S. Constitution, Amendment 14, a criminal defendant has a federal constitutional right to be tried before an impartial judge. See also, Cartalino v. Washington, 122 F. 3d 8, 9 (7th Cir. 1997); Bracey v. Gramley, 117 S. Ct. 1793, 1797, 138 L. Ed. 2d 97 (1997). Because this right is not subject to the harmless error rule, it does not matter how powerful the case against the defendant was or whether the trial judge's bias was manifested in rulings adverse to the defendant. Cartalino, at 9-10. That the Petitioner was convicted by a jury is irrelevant because the trial judge's role in presiding over a jury trial is not merely that of a ministerial character in which no opportunity to act on bias could arise. Cartalino, at 10.

In the report and recommendation adopted by the district court, the magistrate judge cited Canon 3(C)(1) of the Code of Judicial Conduct: "a judge should disqualify himself in a proceeding in which...(a) he has personal knowledge of

disputed evidentiary facts concerning the proceeding." In this case, the trial judge was involved in investigations leading to the Petitioner's trial. He signed the search and arrest warrants.

Instances where Petitioner was denied due process should be viewed after the Petitioner has overcome a presumption of impartiality. Because such presumption has been overcome by the facts as discussed, violation of the Petitioner's due process rights must be evaluated.

Vasquez v. Hillery, aids the evaluation of instances of due process violations against the Petitioner:

> When the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from view, and we must presume the process was impaired.

Vasquez v. Hillery, 474 U.S. 254, 263, 106 S. Ct. 617, 623, 88 L. Ed. 2d 598 (1986) (dicta). The Petitioner contends that the trial judge made pretrial findings that prejudiced Petitioner's case.

Regarding the fairness of the trial, the magistrate judge cited Estelle v. McGuire, 502 U.S. 62 (1991), which states:

> The Due Process Clause guarantees the fundamental elements of fairness in a criminal trial...but it has never been thought that such cases establish this Court as a rulemaking organ for the promulgation of state rules of criminal procedure.

Estelle, 503 U.S. at 70. However, this proposition does not adequately address the fundamental right denied the

Petitioner, Though Petitioner concedes that a trial need not be perfect, a trial must be fair. A fair trial is a constitutional right.

Wherefore, the Petitioner hereby petitions the Court for writ of certiorari.

Respectfully submitted,

This the 2nd day of August, 1999.

David L. Walker
(Counsel of Record)
Law Offices of David L. Walker
P.O. Box 719
Batesville, MS 38606
601-563-2514
MS Bar Number: 06896

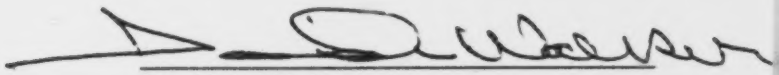
Counsel for Petitioner

Petitioner, Though Petitioner concedes that a trial need not be perfect, a trial must be fair. A fair trial is a constitutional right.

Wherefore, the Petitioner hereby petitions the Court for writ of certiorari.

Respectfully submitted,

This the 2nd day of August, 1999.



David L. Walker
(Counsel of Record)
Law Offices of David L. Walker
P.O. Box 719
Batesville, MS 38606
601-563-2514
MS Bar Number: 06896

Counsel for Petitioner

APPENDIX

Table of Contents

Final Judgement of the United States District Court for the Northern District of Mississippi.....1a

Report and Recommendation of the U.S. Magistrate Judge..... 2a

Final Judgement of the United States Court of Appeals, Fifth Circuit.....17a

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JAMES ALBERT KING PETITIONER

V.

JAMES V. ANDERSON, ET AL. RESPONDENTS

FINAL JUDGMENT

Upon consideration of the pleadings, files and records in this action, the court finds that the petitioner's objections to the Report and Recommendation of the United States Magistrate Judge dated October 24, 1997 are not well taken. The court is of the opinion that the Report and Recommendation should be approved and adopted as the opinion of the court. It is therefore **ORDERED:**

That the Report and Recommendation of the United States Magistrate Judge dated October 24, 1997 is **APPROVED AND ADOPTED** as the opinion of the court; and

That the petition is **DENIED.**

THIS, the 29 day of January, 1998.

\s\ Neal Biggers
NEAL B. BIGGERS, JR
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JAMES ALBERT KING **PETITIONER**

V. **Cause Number 2:96cv181-B-A**

JAMES V. ANDERSON, et al. **RESPONDENTS**

REPORT AND RECOMMENDATION

Petitioner James Albert King, presently in the custody of the Mississippi Department of Corrections, brings before the court his petition for habeas corpus pursuant to 28 U.S.C. §2254(a) (1996). On December 10, 1987, King was sentenced to fourteen (14) years in prison as a habitual offender after being convicted of bribery, conspiracy and two (2) counts of attempting to obstruct and impede the administration of justice on July 24, 1987, in the Circuit Court of the First Judicial District of Tallahatchie County, Mississippi. King then perfected his direct appeal to the Mississippi Supreme Court, alleging the following as error:

a. Whether an indictment which fails to set forth material facts necessary to constitute the offenses sought to be charged is defective.
b. Whether it is sufficient in an indictment charging conspiracy, attempt to obstruct justice and bribery to allege the offenses in the general words of the statutes in conclusory terms without setting forth any of the essential facts or particulars constituting the elements of the offense.
c. Whether an indictment for an attempted offense is sufficient in the absence of alleging particularly an overt act toward the commission of the offense.

d. Whether the constitutional rights of Defendant to remain free on bond were violated by the lower court summarily incarcerating Defendant on the eve of the trial, when he was under a $50,000.00 corporate surety bond, without notice and an opportunity to make additional bond.
e. Whether an instruction on conspiracy allowing the jury to consider the act of any alleged co-conspirator against without first finding that such co-conspirator was in fact a member of the conspiracy is erroneous.
f. Whether defendants were entitled to circumstantial evidence instructions on the burden of proof where there was no direct evidence against such defendants
g. Whether the action of three jurors in violating the sequestration order of the court by separating from the other jurors on two occasions and going to a public lounge where they consumed alcoholic beverages and co-mingled with others vitiated the jury's verdict.

On May 3, 1991, Kings conviction and sentence were affirmed by the Mississippi Supreme Court in a written opinion. King, et al. v. State, 580 So. 2d 1182 (Miss. 1991) (Cause No. 07-KA-59203).

Availing himself of state post-conviction relief remedies, King, on September 8, 1992, filed an Application for Leave to File Motion to Vacate Conviction and Sentence in Trial Court in the Mississippi Supreme Court, in which he asserted:

A. Applicants[1] state that they were denied effective assistance of counsel at trial an [sic] on direct appeal, in that:
    1. Counsel failed to object to having Judge Carlson's name mentioned during the case-in-chief by the prosecution concerning matters that were handled previously by him

causing applicants to be denied a fair trial and due process of law.

2. Counsel failed to call any of applicant's witnesses even though they were under subpoena and present.
3. Counsel failed to object to the closing argument of the prosecution which referred to applicants as thugs and hoods, and to the closing's general rambling nature.
4. Counsel was ineffective for failing to allow the applicants to testify in their case even though he knew they wished to do so.
5. Counsel failed to raise the issue of Judge Carlson not granting the motion to recuse on direct appeal.
6. Counsel was ineffective for failing to raise a neutral and detached magistrate claim on direct appeal.
7. Counsel was ineffective for failing to raise the multi-count indictment claim on direct appeal.

B. Applicants were denied a fair trial and due process of law when Judge Carlson failed to grant their motion to recuse.

On March 12, 1993, king filed a Supplemental Application for Leave to File a Motion to Vacate Conviction and Sentence in the Circuit Court of Tallahatchie County,, Mississippi, making the following additional claims:

Applicants were denied ineffective assistance of counsel in that:

---

[1]The word "applicants" is pluralized due to the fact that this and the other grounds in the application were asserted by both Petitioner Johnny Wayne King, and his co-indictee and father, James Albert King.

A.

1. Counsel failed to object to applicants being tried on a multi-count indictment.
2. Counsel introduced prejudicial and damaging evidence (search warrants and affidavits) during the prosecution's case-in-chief.
3. Counsel was ineffective at trial for allowing the prosecution to refer to the applicants as hoods and thugs.
4. Counsel allowed the prosecution to bolster the testimony of the state's witnesses.
5. Counsel allowed the prosecution to appeal to the jury on sympathy for the community.
6. Counsel allowed the prosecution, without objection, to use false and misleading evidence to convict applicants.

B. The jury verdict was against the overwhelming weight of the evidence and contrary to law in that the prosecution failed to prove that applicants had bribed a juror.

C. Applicant James Albert King was denied due process of law when he was, without court's order, transferred from the Tallahatchie County Jail to the Panola County Jail.

D. The cumulative effects of counsels' errors denied them effective assistance of counsel.

E. The Mississippi Supreme Court, on direct appeal, mis-stated [sic] the facts of the case.

On August 15, 1996, the Mississippi Supreme Court denied King's application in a written opinion. King, et al. v. State, 679 So. 2d 208 (Miss. 1996)(Cause No. 07-KA-59203-SCT).

King now lists the following as error in his § 2254 petition:

1. Counsel was ineffective by not raising the judge's failure to recuse himself on direct appeal.

2. Counsel was ineffective by not allowing petitioners to testify at trial.
3. Counsel was ineffective by allowing the jurors to be mislead concerning critical evidence.

Respondents have answered and, while admitting King has exhausted available state remedies,[2] deny that he is entitled to the relief requested or any relief at all. More specifically, Respondents contend that because all three claims have been previously decided on the merits by the Mississippi Supreme Court, federal habeas review is severely limited under 28 U.S.C § 2254(d).[3] After a thorough review of the state court record, pleadings and supporting documents, the court is of the opinion that Petitioner's claims are without merit and recommends that the petition be denied.

---

[2]"Federal courts will generally not consider claims in a section 2254 habeas petition that have not been first presented to the state courts...[i]n other words, the petitioner must exhaust all available state remedies before he may obtain federal habeas relief." Sones v. Hargett, 61 F.3d 410, 413 (5th Cir. 1995)(citation omitted); Rodriguez v. McKaskle, 724 F.2d 463, 466 (5th Cir. 1984).

[3]28 U.S.C. § 2254(d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding

The Antiterrorism and Effective Death Penalty Act [AEDPA], signed by the President on April 24, 1996, substantially altered 28 U.S.C. § 2254 which governs this proceeding. "[T]he Act altered the legal standard for granting habeas relief to state prisoners based upon violations of their federal constitutional rights." Childress v. Johnson, 103 F.3d 1221, 1224 (5th Cir. 1997) (citation omitted). Because this petition was filed November 5, 1996, application of the amended version of § 2254 is proper.[4] Therefore, this report and recommendation is based upon §2254, as amended by the AEDPA.

The first claim raised by King alleges ineffective assistance of counsel based on counsel's failure to raise on direct appeal the issue of whether the trial judge should have granted the defense's recusal motion. In the midst of the ineffective assistance claim, however, King also raised the substantive issue of whether the judge should have granted the motion and recused himself. While the substantive claim was raised in post-conviction proceedings and thus meets the exhaustion requirements, see Sones v. Hargett, 61 F.3d at 415 ("[t]he exhaustion of state remedies can be accomplished either directly or collaterally")(citation omitted), it was not raised on direct appeal. A claim brought before the Mississippi Supreme Court for the first time on collateral appeal will normally be dismissed pursuant to Miss. Code

---

[4]Humphrey v. Cain, 120 F.3d 526, 528 (5th Cir. 1997) (on rehearing); Shute v. Texas, 117 F.3d 233, 235 (5th Cir. 1997) (on rehearing).

Ann. § 99-39-21 ("Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors...capable of determination at trial and/or on direct appeal...shall constitute a waiver thereof and shall be procedurally barred"). Ineffective assistance of counsel claims, however, will not be so treated if the petitioner's trial and appeal counsel are the same. See Sones v. Hargett, 61 F.3d at 416, n.9. Although it did not specifically address the assignment in its decision regarding King's post-conviction relief application, the Mississippi Supreme Court evidently disposed of the ineffective assistance claim on its merits via a blanket pronouncement that "[a]ll other issues raised by the Kings are also clearly without merit." King, et al. v. State, 679 So. 2d at 209.

It is essential to federal habeas inquiry to first determine whether a state court's disposition of a claim was procedural or substantive. If the claim was disposed of on procedural grounds, then federal analysis focuses on whether application of the procedural bar is proper. On the other hand, if the state court found a claim to be without merit, then the federal court must look to §§ 2254(d) and (e) to find the appropriate measure of deference to be afforded the state court determinations. Because the Mississippi Supreme Court's decision refers to its "thorough review" and fails to mention the procedural bar, this court finds that the substantive issue of whether the trial judge should have recused himself was denied on the merits in state court. Accordingly, the presumption of correctness as to issues both factual, see 28 U.S.C. § 2254(e)(1) ("a determination of

a factual issue made by a State court shall be presumed to be correct"), and legal, see 28 U.S.C § 2254(d), applies to all claims raised in this petition. Green v. Johnson, 116 F.3d 1115, 1121 (5th Cir. 1997); see Livingston v. Johnson, 107 F.3d 297, 302-303 (5th Cir. 1997).

King alleges the trial judge's failure to grant the motion to recuse was a violation of due process. The first issue to be determined is whether the court has jurisdiction, as the assignment is predicated on a state law issue. "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." Estelle v. McGuire, 502 U.S. 62, 67-68 (1991)(citation omitted). A cursory examination of relevant Mississippi law reveals that a trial judge is to recuse himself "'if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality.'" Hunter v. State, 684 So. 2d 625, 630 (Miss. 1996)(quoting Rutland v. Pridgen, 493 So. 2d 657, 678 (Miss. 1986). Although there is a presumption "'that a judge, sworn to administer impartial justice, is qualified and unbiased,'" Hunter, at 630 (quoting Turner v. State, 573 So. 2d 657, 678 (Miss. 1990)), Canon 3(C)(1) of the Code of Judicial Conduct provides that "[a] judge should disqualify himself in a proceeding in which...(a) he has...personal knowledge of disputed evidentiary facts concerning the proceeding." Hunter, at 630 (quoting Miss. Code of Judicial Conduct, Canon 3(C)(1)). This judicial canon, when

employed in such a situation, "'enjoys the status of law such that we enforce it rigorously...." Hunter, at 630 (quoting Green v. State, 631 So. 2d 167, 177 (Miss. 1994)). Given Judge Carlson's personal knowledge relating to the alleged jury tampering charges and explicit, pre-trial finding that the Kings were in fact guilty, it is eminently reasonable for Petitioner to raise questions about his impartiality. Nevertheless this court is not permitted to make exhaustive inquiries into state law matters. Whether or not this court agrees with Judge Carlson's ruling on the motion to recuse is not the standard. Rather, it is incumbent upon Petitioner overcome the presumption of impartiality. The court is simply unable to conclude that Petitioner has met this burden.

Regardless of the correctness of Judge Carlson's decision to deny his motion to recuse, the court is unable to find an instance in the entire transcript where King was denied due process. The proceedings were conducted in a completely impartial and fair manner by Judge Carlson, allowing, among other things, ample opportunity for argument concerning each motion presented by either side. "'[T]he Due Process Clause guarantees the fundamental elements of fairness in a rulemaking organ for the promulgation of state rules of criminal procedure.'" Estelle v. McGuire, 502 U.S. at 70 (quoting Spencer v. Texas, 385 U.S. 554, 563-64 (1967)(citations omitted)). The court recommends that this claim be denied as being without merit.

The first claim also contains an ineffective assistance allegation based on counsel's failure to raise the issue of Judge Carlson's denial of King's motion to recuse on direct appeal. "An accused is entitled to the effective assistance of counsel on a direct appeal as of right." Hamilton v. McCotter, 772 F.2d 171, 181 (5th Cir. 1985); Evitts v. Lucey, 469 U.S. 387 (1985). An ineffective assistance of counsel claim predicated on appellate error is scrutinized under the Strickland v. Washington analysis. "A habeas petitioner alleging ineffective assistance of counsel must demonstrate both constitutionally deficient performance by counsel and actual prejudice as a result of such ineffective assistance." Carter v. Johnson, 110 F.3d 1098, 1109-10 (5th Cir.1997); see Strickland v. Washington; 466 U.S. 668,687 (1984); see also Motley v. Collins, 18 F.3d 1223, 1226 (5th Cir. 1994)(summarization the Washington standard of review). "Failure to prove wither deficient performance or actual prejudice is fatal to an ineffective assistance claim." Carter, 110 F.3d at 1110 (citing Strickland v. Washington, 466 U.S. at 687).

Several factors weigh against granting habeas relief to King on this claim. "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland v. Washington, at 689. The court is not to analyze counsel's actions in hindsight, but rather to judge his or her decisions in a "highly deferential"

manner. Motley v. Collins, 18 F.3d at 1226 (quoting Strickland, at 689). Despite the pronouncement of the Fifth Circuit that "[c]ounsel is not deficient for failing to raise every meritorious claim that may be pressed on appeal," Green v. Johnson, 116 F.3d at 1126; see Ellis v. Lynaugh, 873 F.2d 830, 840 (5th Cir. 1989), the court's reservations concerning Judge Carlson's failure to grant the motion to recuse could lead one to believe that counsel should have raised that issue on direct appeal. It is because of such uncertainties that the court proceeds to the prejudice prong of the analysis to determine whether the complained of error harmed the defense.

If counsel's performance is deemed to have been deficient, "'then [the court] must determine whether there exists a reasonable probability that but for the complained-of error the outcome of the trial or appeal would have been different.'" Pitts v. Anderson, No. 96-60673, 1997 WL 5442847, at *3 (5th Cir. Sept. 19, 1997) (quoting Sharp v. Johnson, 107 F.3d 282, 286 n.9 (5th Cir. 1997). The test formulated in Strickland

> Requires that a habeas petitioner prove not only that counsel's performance was deficient, but also that the deficient performance actually prejudiced the defense to such an extent that there is a reasonable probability that, but for the attorney's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings.

Armstead v. Scott, 37 R.3d 202, 206 (5th Cir. 1994)(citing Strickland, at 694). To find prejudice, the court must look beyond mere outcome determination. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceedings was fundamentally unfair or unreliable is defective." Armstead, 37 F. 3d at 207 (citation omitted). Furthermore, the "unreliability" or "unfairness" mentioned in Strickland does not occur unless the ineffectiveness of counsel deprives the defendant of a "substantive or procedural right to which the law entitles him." Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

Returning to the state court proceedings, there is no evidence in the record to indicated that Judge Carlson's presiding over the trial caused any prejudice to befall King. Because of the dearth of evidence of prejudice at trial, no "unreliability" is cast over King's direct appeal proceedings. The court is confident that had Judge Carlson's denial of the motion to recuse been raised on direct appeal, the Mississippi Supreme Court would have not granted relief. Because of King's failure to demonstrate prejudice, the court recommends that this claim be denied as without merit.

The second claim, also couched under the heading of ineffective assistance of counsel, alleges that King was deprived the opportunity to testify on his own behalf. This issue was addressed at length by the Mississippi Supreme Court in post-conviction proceedings. "The ultimate determination whether counsel was constitutionally ineffective is a mixed question of law and fact that federal

habeas courts have traditionally reviewed de novo." Carter v. Johnson, 110 F.3d at 1110; see, e.g., Salazar v. Johnson, 96 F.3d 789, 791 (5th Cir. 1996); United States v. Faubion, 19 F.3d 226, 228 (5th Cir. 1994). However, after the AEDPA was enacted, "federal courts must now honor the conclusions of state courts regarding the constitutional effectiveness of counsel, unless such determined by the Supreme Court." Carter, at 1110; see AEDPA § 104(3); see also Moore v. Johnson, 101 F.3d 1069, 1075-76 (5th Cir. 1996)(holding that ineffective assistance of counsel claims are reviewed under the "unreasonable application" standard). After nothing Judge Carlson's explicit instructions directed at Petitioner concerning his right to testify, the Mississippi Supreme Court found this claim to be totally without merit. That court also drew support from the fact that King was a habitual offender and thus readily impeachable, and that the decision of which witnesses to call has traditionally been regarded as a matter of trial strategy. King v. State, 679 So.2d at 211-12 (citations omitted). King having failed to satisfy the standard imposed by § 2254(d), as amended by the AEDPA, the court recommends that this claim be denied as without merit.

In his final claim, King again alleges ineffective assistance of counsel. Here, King argues the counsel was deficient in allowing the jury to be mislead that certain jury lists admitted into evidence were related to his son's (Johnny Wayne King) earlier criminal trial from which the jury tampering charges came. King argues that the lists were instead from a civil case which was scheduled for the same

term of court as his son's criminal case. The underlying claim of misleading the jury was raised initially in post-conviction proceedings where, evidently, the Mississippi Supreme Court denied it on the merits. King has now decided to place the claim within the context of an ineffective assistance argument. Without passing on whether counsel adequately distinguished Exhibits 2, 3 and 4 as not being related to Johnny Wayne King's earlier trial, the court is once again unable to find any prejudice that might have been caused thereby. Additionally, the transcript clearly reveals counsel questioning Paul Easteridge, Circuit Clerk of Tallahatchie County, specifically on whether the jury lists marked as Exhibits 2, 3 and 4 related to the Johnny Wayne King's earlier trial, the court is once again unable to find any prejudice that might have been caused thereby. Additionally, the transcript clearly reveals counsel questioning Paul Easteridge, Circuit Clerk of Tallahatchie County, specifically on whether the jury lists marked as Exhibits 2, 3 and 4 related to the Johnny Wayne King trial or another case. (Tr. p.393). The court recommends that this claim be denied as without merit.

Pursuant to the foregoing analysis, the court recommends that each claim contained in this petition be denied as without merit.

The parties are referred to 28 U.S.C. § 636(b)(1)(B) and FED. R. CIV. P. 72(b) for the appropriate procedure in the event any party desires to file objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten (10) days after

being served with a copy of this report and recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the un-objected to proposed factual findings and legal conclusions accepted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1428-29 (5th Cir. 1996)(en banc)(footnotes omitted).

Petitioner is directed to acknowledge receipt of this report and recommendation by signing the enclosed acknowledgement form and returning it to the clerk of court within ten (10) days of service. Petitioner is warned that failure to comply with the requirements of this paragraph may lead to dismissal of this lawsuit under FED. R. CIV.P. 41(b) (1996) for failure to prosecute and for failure to comply with an order of the court.

Respectfully submitted this 24 day of October, 1997.

/s/ S. Allen Alexander
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
MAY 25 1999
CHARLES R. FULBRUGE III
CLERK

No. 98-60078
USDC No. 2:96-CV-181-B

JAMES ALBERT KING,

Petitioner-Appellant,

versus

JAMES V. ANDERSON ET AL.,

Respondents-Appellees.

* * * * * * * * * * * * * * * * * * *

No. 98-60100
USDC No. 2-96-CV-180-B

JOHNNY WAYNE KING,

Petitioner-Appellant,

versus

JAMES V. ANDERSON ET AL.,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Mississippi

Before DAVIS, DUHÉ, and PARKER, Circuit Judges

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

James Albert King, Mississippi prisoner # 77235, and Johnny Wayne King, Mississippi prisoner # 11815, appeal the district court's denial of their 28 U.S.C. § 2254 petitions. The Kings argue that the refusal of the trial judge to recuse himself violated their constitutional right to a fair trial by an impartial judge.

We have reviewed thoroughly the briefs, the record, and the law and hold that the judge's participation in the case did not violate due process. See Bracy v. Gramley, 520 U.S. 899, 904-05 (1997); Bradshaw v. McCotter, 796 F.2d 100, 101 (5th Cir. 1986).

The Kings also argue that their attorney was ineffective for failing to raise the recusal issue on direct appeal. They have failed to establish that but for counsels' error, the outcome of the appeal would have been different. See Strickland v. Washington, 466 U.S. 668, 687 (1984); Pitts v. Anderson, 122 F.3d 275, 279 (5th Cir. 1997).

AFFIRMED.